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25 JAMES O'KEEFE III

14 UNITED STATES DISTRICT COURT  
15 SOUTHERN DISTRICT OF CALIFORNIA

16 JUAN CARLOS VERA, an  
17 individual,  
18 Plaintiff,  
19 v.  
20 JAMES O'KEEFE III, an individual,  
21 HANNA GILES, an individual, and  
22 DOES 1-20 inclusive,  
23 Defendants.

24 Case No. CV 10-1422-L-MDD

25  
26 DEFENDANT O'KEEFE'S  
27 MEMORANDUM OF POINTS AND  
28 AUTHORITIES IN SUPPORT OF  
HIS MOTION FOR A  
PROTECTIVE ORDER  
REGARDING COUNSEL FOR  
PLAINTIFF'S ISSUANCE OF  
SUBPOENAS OR, IN THE  
ALTERNATIVE, MOTION TO  
QUASH, AND MOTION FOR FEES

Hon. Mitchell D. Dembin,  
United States Magistrate Judge

25 Pursuant to Federal Rules of Civil Procedure 26(c), 45(c)(3), and 37(a)(5)  
26 and Local Civil Rule 7.1(f), defendant James O'Keefe submits this memorandum of  
27 points and authorities in support of his motion for a protective order regarding  
28

1 subpoenas to telephone companies seeking defendant O'Keefe's telephone records  
2 or, in the alternative, to quash these subpoenas, and for fees pursuant to Rule  
3 37(a)(5). The records sought are private, are privileged under California law, and  
4 have been expressly ruled irrelevant and protected from disclosure by this Court.

5 **BACKGROUND**

6 On September 20, 2011, counsel for plaintiff issued a subpoena to AT&T  
7 seeking all records from May 18, 2009, to October 18, 2009, relating to phone  
8 numbers that included numbers that have been used by defendant O'Keefe.  
9 Declaration of Compliance and Further Statement of Michael E. Rosman dated  
10 October 19, 2011 ("Decl."), Exhibit 1. On the same date, counsel for plaintiff  
11 issued a subpoena to Verizon seeking all records from May 18, 2009, to October  
12 18, 2009, relating to two telephone number used by defendant O'Keefe. Decl.,  
13 Exhibit 2. On September 23, 2001, this Court issued its order on the parties' joint  
14 motion for determination of a discovery dispute ("Order") (Doc. No. 43). In the  
15 Order, this Court concluded expressly that plaintiff was not entitled to discovery of  
16 defendant O'Keefe's telephone bills. In ruling on plaintiff's Request for Production  
17 No. 12, the Court explained:

18 This Request seeks telephone bills for any phones used by  
19 Defendant between June 2009 and November 2009. Defendant objects  
20 for relevance and privacy concerns. Plaintiff claims he is entitled to  
discovery because these records will reveal other parties involved in  
planning the secret recordings.

21 The Court agrees that the Request is overbroad and not  
22 reasonably calculated to lead to admissible evidence. Plaintiff has not  
23 indicated whom he hopes to identify through this request nor how  
phone records would inform any aspect of the claims or defenses in  
this case.

24 Order at 8.

25 On September 27, 2011, attorneys for defendant O'Keefe and defendant  
26 Hannah Giles (whose telephone records also were sought in subpoenas plaintiff  
27 issued) and plaintiff's attorney Eugene Iredale met and conferred on this issue in a  
28 telephone conference call. An attorney for defendant Giles asked Mr. Iredale if he

1 would withdraw the subpoenas seeking defendants' telephone records in light of the  
 2 express Order by this Court, and Mr. Iredale said that he would not withdraw them.  
 3 Decl. ¶ 3. Attorneys for defendant O'Keefe subsequently learned that Verizon  
 4 apparently has complied with the subpoena issued to it. Decl. ¶ 3. On October 10,  
 5 2011, defendant O'Keefe's counsel Michael E. Rosman followed up on the meet  
 6 and confer with an email to Mr. Iredale confirming the contents of that  
 7 conversation. Decl. ¶ 3, Exhibit 3.

8 **ARGUMENT**

9 The records plaintiff seeks in these subpoenas are private information and  
 10 privileged under California law. As seen above, this Court also has concluded that  
 11 they are irrelevant to this action and has protected them from discovery.

12 California raises privacy to the level of an inalienable right. Article 1,  
 13 Section 1 of the California Constitution provides:

14 All people are by nature free and independent and have inalienable  
 15 rights. Among these are enjoying and defending life and liberty,  
 16 acquiring, possessing, and protecting property, and pursuing and  
 obtaining safety, happiness, and privacy.

17 Furthermore, in Cal. Code Civ. P. § 1985.3, telephone records of consumers are  
 18 protected from disclosure. Under that statute, a party who issues a subpoena *duces*  
 19 *tecum* seeking telephone records of a consumer must follow strict procedures, and  
 20 the subpoena shall not be valid or effective unless it includes a consent to release  
 21 the records signed by the consumer. Cal. Code Civ. P. § 1985.3(f).

22 Given these provisions, it is clear, at the minimum, that telephone records of  
 23 consumers are privileged under California law. *Robinson v. Kia Motors America,*  
 24 *Inc.*, 2011 WL 2433369, 1-4 (E.D. Cal. 2011) (discussing the telephone-records  
 25 privilege under California law). And Federal Rule of Evidence 501 provides that  
 26 "in civil actions....., with respect to an element of a claim or defense as to which  
 27 State law supplies the rule of decision, the privilege of a....person.... shall be  
 28 determined in accordance with State law." *Lewis v. U.S.*, 517 F.2d 236, 237 n.2 (9<sup>th</sup>

1 Cir. 1975) (“[S]tate privilege law is binding in federal civil proceedings in which  
2 state law provides the rule of decision”). Here, of course, plaintiff’s sole claim is  
3 for a violation of California Penal Code § 632.

4 Under Federal Rule of Civil Procedure 26(b)(1), discovery is limited to  
5 “nonprivileged matter that is relevant to any party’s claim or defense.” Under Rule  
6 26(c)(1), a “court may, for good cause, issue an order to protect a person or party  
7 from annoyance, embarrassment, [or] oppression.” Under Rule 45(c)(3)(A)(iii), a  
8 court “must quash or modify a subpoena that.... requires disclosure of privileged or  
9 other protected matter.”

10 Since the records sought here are privileged, and also protected from  
11 disclosure by the Court’s Order, defendant O’Keefe’s motion for a protective order  
12 pursuant to Rule 26(c), or to quash under Rule 45(c)(3), should be granted. And  
13 both the status of the records as privileged and the explicit ruling by this Court that  
14 they are irrelevant under Rule 26(b)(1) and thus outside the limits of discovery  
15 constitute ample cause to protect defendant O’Keefe from “annoyance,  
16 embarrassment, [or] oppression” pursuant to Rule 26(c)(1). *See, e.g., In re*  
17 *REMEC, Inc. Securities Litigation*, 2008 WL 2282647, 1 (S.D. Cal. 2008) *and*  
18 *cases cited therein* (“A party can move for a protective order in regard to a  
19 subpoena issued to a non-party if it believes its own interests are jeopardized by  
20 discovery sought from a third party and has standing under Rule 26(c) to seek a  
21 protective order regarding subpoenas issued to non-parties which seek irrelevant  
22 information.”).

23 Accordingly, the Court should order that, to the extent the subpoenas have  
24 not yet been complied with, they not be complied with, and that plaintiff neither use  
25 nor disclose any information obtained from any previous compliance with them.

26 **FEES**

27 When asked to withdraw these subpoenas in light of the Court’s ruling that  
28 the information required to be disclosed in them is irrelevant, counsel for plaintiff

refused. Decl. ¶ 3. In light of the Court's Order, which protected these records from disclosure, and the privileged nature of the records, counsel for plaintiff was not substantially justified in believing that these subpoenas were proper discovery, and no other circumstances would make an award of fees here unjust. Fed. R. Civ. P. 37(a)(5)(A); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *Aloe Vera of America, Inc. v. U.S.*, 376 F.3d 960, 965 (9<sup>th</sup> Cir. 2004) (upholding sanctions for a party's attempt to disclose confidential information, the disclosure of which was limited by court order, by relitigating that order); *Devaney v. Continental American Ins.*, 989 F.2d 1154, 1162 (11th Cir. 1993) ("[S]anctions under [then-]Rule 37(a)(4) are mandatory unless the court finds a substantial justification for discovery delays"); *Boulos v. Cato*, 11 Fed. R. Serv. 3d 491, 493 (S.D.N.Y. 1988) ("[A]ssessment of expenses is mandatory unless opposition to the motion was substantially justified or because other circumstances make an award of expenses unjust"); *American Hangar, Inc. v. Basic Life, Inc.*, 105 F.R.D. 173, 176 (D. Mass. 1985) ("[T]he award of expenses, including attorney's fees, is mandatory unless the Court is able to make either of the two findings noted, i.e. either (1) that the opposition to the motion was substantially justified, or (2) that other circumstances make an award of expenses unjust"). Accordingly, plaintiff should be ordered to pay defendant O'Keefe's reasonable attorneys' fees in connection with this motion, pursuant to Federal Rules of Civil Procedure 26(c)(3) and 37(a)(5).

## **CONCLUSION**

For these reasons, defendant O'Keefe's motion should be granted.

1 Dated: October 21, 2011

Respectfully submitted,

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6 By s/ Michael E. Rosman

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